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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 884

In The Matter Of:

HELBROS WATCH CO., INC., (A Corporation); JACK DIAMOND, NAT PRIGOZEN, LARRY PRIGOZEN, CARL AVNER, Individually and as officers of said corporation, *Petitioners*,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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I. B. Paul Noble, attorney for Petitioners, Helbros Watch Company, Inc. (A Corporation), Jack Diamond, Nat Prigozen, Larry Prigozen, Carl Avner, individually and as officers of said corporation, prays that a Writ of Certiorari issue to review the Final Order Affirming and Enforcing Order to Cease and Desist,

entered by the United States Court of Appeals for the District of Columbia Circuit on January 10, 1963, based upon judgment of that Court filed November 29, 1962.

OPINION BELOW

Said judgment and Decree were entered pursuant to an opinion of that Court decided November 29, 1962, in its docket No. 16,912, which affirmed a Final Order to Cease and Desist entered by the Federal Trade Commission on December 26, 1961, in its docket No. 6807.

The opinion of the Court of Appeals (Appendix "A") is reported at 310 F. 2d 868, (C.C.A. D.C. 1962).[1]

JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit entered its opinion on November 29, 1962, on Petition to Review Cease and Desist Order issued by the Federal Trade Commission on December 26, 1961, in its Docket No. 6807,[2] based upon the Commission's Opinion in that case.[3]

The Court of Appeals entered its Final Decree Affirming and Enforcing Order to Cease and Desist[4] on January 10, 1963, based upon its judgment dated November 29, 1962.[5]

The jurisdiction of this Court is invoked pursuant to Section 5 of the Federal Trade Commission Act (15 U.S.C.A. 45, (g), (2), (h)).

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[1] Appendix "A" This Brief, *Opinion.*

[2] Appendix "B", *Final Order.*

[3] Appendix "C", *Opinion of the Commission.*

[4] Appendix "D", *Final Decree Enforcing etc.*

[5] Appendix "E", *Judgment of Court.*

QUESTIONS PRESENTED FOR REVIEW

II. Whether the Final Order of the Federal Trade Commission is arbitrary and capricious;

A. Whether the pre-ticketed or suggested retail prices of a manufacturer's products are fictitious and consequently false, misleading and deceptive where, when products are sold at retail, they are sold at those prices, but, where, when sold through catalogue distributors or discount merchants they are sold at substantially less than the pre-ticketed prices. Whether substantial sales at pre-ticketed prices establish those prices as the usual and regular retail prices and preclude the entry of an Order to Cease and Desist based upon other evidence of substantial sales at substantially less than the advertised or pre-ticketed prices.

STATUTES INVOLVED

Section 5 of the Federal Trade Commission Act (38 Stat. 711, as Amended, 52 Stat. 111; 66 Stat. 632; 15 U.S.C.A. 45, (a), (b)). (See Appendix "F", this Petition).

STATEMENT OF THE CASE

The jurisdiction of the Court below was founded upon (15 U.S.C.A. 45, (b), (c) and (d)).

The Decree of the United States Court of Appeals for the District of Columbia Circuit affirms and enforces the Final Order of the Federal Trade Commission and was entered on the Court's decision after argument on Petition to Review.

Petitioners argued below that the Commission's Final Order is arbitrary and capricious because the evidence had established that ultimate consumers paid the suggested retail or pre-ticketed prices when they

purchased Petitioner's watches from house-to-house canvassers or from retail credit jewelers.

The evidence further established that ultimate consumers who purchased Petitioner's watches from discount stores or catalogue dealers pay substantially less than the pre-ticketed or suggested retail price.

Petitioners argued below that a sale through a discount store or catalogue dealer is not a retail sale since these outlets in the market must sell at a discount from retail in order to survive, and that consequently there is no evidence in the record of retail sales from which a finding could be made as to the prices at which Petitioner's watches regularly sell at retail.

Petitioners argued below and will urge here that since a manufacturer has no control over the actual selling price of his products and pre-tickets them without means of policing the ultimate sale price, *scienter* of the fact that the pre-ticketed price is excessive must be found before a Cease and Desist Order can be entered.

Petitioners contended below that where the evidence establishes that substantial sales to consumers are at the suggested retail price, an Order based upon other evidence of sales at substantially less than the suggested retail price is arbitrary and capricious.

The Court below held that "in determining the usual and regular retail price, it is necessary to consider all sales of like items in the same market".

The material consequences of the application of this rule is that a manufacturer will be precluded from pre-ticketing his products at all. It is clear that in a highly competitive business such as the watch industry, no

manufacturer will be able to suggest retail prices or pre-ticket his products if he is required at the time he determines the prices to ascertain prices at which they will in the future be sold in different market areas.

As a result, therefore, of the application of the rule propounded by the Court below, pre-ticketing or the suggesting of retail prices based upon comparison of quality, supply and demand and other competitive factors will discontinue and leave the consuming public at the mercy of unscrupulous dealers who will quote prices to accomplish sales without evaluation of competition on a level such as is available to the manufacturers.

REASONS FOR GRANTING WRIT

1. The decision of the Court of Appeals here is in conflict with decisions of the Court of Appeals in the District of Columbia,[6] in the 3rd Circuit,[7] 4th Circuit,[8] and 7th Circuit,[9] all of which have recently decided different cases involving the issue of fictitious prices created by pre-ticketing of products, but the combination of which is confusing to manufacturers generally and the watch industry in particular.

ARGUMENT

The District of Columbia Circuit in *Allen V. Tornek* v. *F. T. C., supra*, affirmed an order of the Federal Trade Commission entered in Docket No. 6344, re-

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[6] *Allen V. Tornek* v. *F. T. C.*, 276 F. 2d 513, affirming Final Order of the Commission in Docket No. 6344.

[7] *Bankers Security Corp.* v. *F. T. C.*, 297 F. 2d 403.

[8] *Baltimore Luggage Co.* v. *F. T. C.*, 296 F. 2d 608.

[9] *Clinton Watch Co.* v. *F. T. C.*, 291 F. 2d 838.

quiring a watch manufacturer to cease and desist from supplying price tags in bulk to his customers leaving to them the discretion of selecting the retail price to be affixed to his watches.

In *Bankers Security Corp.* v. *F. T. C., supra*, the Third Circuit Court of Appeals held that the evidence supported finding that a store's advertisement comparing its price to regular or usual price was deceptive as implying reference to store's own prices, whereas the store had no usual or regular price for the product *even though the quoted higher prices prevailed in other stores in the area*, but that the order was too broad in its application to all stores owned or controlled by petitioner."

The Fourth Circuit, in *Baltimore Luggage Co.* v. *F. T. C., supra*, held that pre-ticketing by a manufacturer is not per se fictitious pricing, but where *37.5% in volume* of a manufacturer's products are sold at less than the pre-ticketed price an order to cease and desist was justified.

On the other hand, the Seventh Circuit in *Clinton Watch Co.* v. *F. T. C., supra*, affirmed an order of the Commission requiring a watch manufacturer to cease and desist from "fictitiously pre-ticketing its watches." There was no evidence in the *Clinton Case*, as here, of a substantial volume of sales at the pre-ticketed price.

Here the Examiner found—and the Commission did not controvert his finding—that when sold at retail by retail jewelers petitioner's watches are sold at the pre-ticketed prices.[10] There the ticket affixed was found to be "substantially in excess of the normal and usual retail price."

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[10] Appendix "C", *Opinion of the Commission*.

This Court has not yet, and should decide when a Manufacturer's pre-ticketed prices are fictitious.[11]

Here there is no finding as to the relative volume of sales at less than the pre-ticket price.

The confusion arises when a manufacturer attempts to devolve a rule of reason out of the cases here referred to decided by various courts of appeals.

Clearly the public is better protected by a manufacturer who lists his suggested prices and pre-tickets his products with corresponding price tags. (*Tornek* v. *F.T.C.*, *supra* and *Baltimore Luggage Co.* v. *F. T. C.*, *supra*). But when he pre-tickets his products, the prices must not be exaggerated in excess of the normal and usual prices at which they are sold at retail. (*Clinton Watch* v. *F. T. C.*, *supra*).

Does this mean that a manufacturer—who has lost control of selling price after his product leaves the factory—must ticket his products after sampling his selling market to determine the prices at which they are actually sold? The impossibility of so doing suggests itself.

Should he then, disdain from listing or pre-ticketing until a price is established for each item? Watches are by force of competition projected for the market from year to year. They are channeled through economic distribution into varying geographic and merchandising areas. Consequently, such a policy would

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[11] See also: *Ninesk Industries* v. *F. T. C.*, 278 F. 2d 337; *Hanson Distributors, Inc.* v. *F. T. C.*, 263 F. 2d 396; *The Fair* v. *F. T. C.*, 272 F. 2d 609; *Mandel Bros. Inc.* v. *F. T. C.*, 254 F. 2d 18.

lead ultimately to even grater confusion of the public and to producer bewilderment. Different prices would be established in differing distribution areas and by the time each would be clearly established the next years production would be on hand for similar price evaluation. In the meantime, the manufacturer would be confronted with the dangers inherent in *Allen V. Tornek* v. *F. T. C.* (*supra*) since it might be reasoned from the ruling there that failure to pre-ticket or unpriced distribution is, *per se*, placing a means or instrumentality into the hands of others to deceive the public and an unfair trade practice.

On the other hand, under the decision of the Third Circuit in *Bankers Security Corp.* v. *F. T. C.*, any manufacturer's list or pre-ticketed retail price may be fictitious, and consequently false, misleading and deceptive *if it is not the price at which the product is usually and regularly sold by each specific customer.*

It is manifest that quality control and the customers' vested interest in the manufacturer's estimate in advance of a year to year distribution of his product's value, require that a manufacturer pre-ticket and list unit prices. The Clinton Watch case makes it clear that it should not be an *exaggerated* estimate of ultimate selling price.

These two general concepts provide the black and white. But it is in the grey area, expansive between the two, that the Court's attention is required.

It is submitted that *intent to deceive*, that is a showing of knowledge that the product will not usually sell at the pre-ticketed price, may provide the needed answer. Such a showing was not here made and, indeed, the evidence here negated such intent.

We urge then that only this Court can resolve the economic chaos inherent in the differing cases cited and the conflict of the decision of the court below here with all and each of those cases, all deciding the same issue.

CONCLUSIONS

Petitioners pray that this Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit to review an order of that Court based upon its decision in its docket No. 16,912, be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for a Writ of Certiorari were mailed, postage prepaid, this 1st day of March, 1963, to The Honorable Archibald Cox, Solicitor General of the United States, Department of Justice, Washington 25, D. C., and that two copies were mailed in a like manner on the same day to Joseph Shea, Esquire, Secretary, Federal Trade Commission, Washington 25, D. C.

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